Supreme Court, U.S.
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No. 93-935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FREEMAN UNITED COAL MINING COMPANY,
Petitioner,

v.

DONALD L. JONES,
Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR,
Party-In-Interest.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Donald L. Jones respectfully requests that the Petition for issuance of a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit be denied.

STATEMENT OF THE CASE

Freeman's "Statement of the Case" contains a potentially misleading contention regarding the appeal to the Benefits Review Board ("BRB") after remand to the Administrative Law Judge ("ALJ"). Freeman states that "Specifically, the Board rejected *Freeman's challenge to the true doubt rule*. . . ." Freeman's Petition, p. 7 (emphasis added). Although Freeman did criticize the ALJ's use of the true doubt rule before the BRB, it never argued that the rule was inconsistent with the Administrative Procedure Act ("APA") until the case reached the Seventh Circuit Court of Appeals. Respondent Jones maintains that Freeman waived the issue by its delay, but this contention was rejected by the court of appeals. *Freeman United Coal Mining Co. v. Director, OWCP*, 988 F. 2d 706, 709, n. 3 (7th Cir. 1993).

REASONS FOR DENYING THE WRIT

I. Introduction.

The Black Lung Benefits Act, ("BLBA") 30 U.S.C. 932(a) incorporates section 19(d) of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. 919(d), which requires that hearings be conducted pursuant to section 5 of the APA, 5 U.S.C. 554. In this case the Seventh Circuit Court of Appeals held that the true doubt rule does not offend the APA. *Freeman United Coal Mining Co. v. Director, OWCP*, 988 F. 2d 706 (7th Cir. 1993). The Sixth Circuit has concurred with the Seventh Circuit's analysis of this issue, *Skukan v. Consolidation Coal Co.*, 993 F. 2d 1228 (6th Cir. 1993), while the Third Circuit has not. *Greenwich Collieries v. Director, OWCP*, 990 F. 2d 730 (3d Cir. 1993); *Maher Terminals v. Director, OWCP*, 992 F. 2d 1277 (3d Cir. 1993). The Seventh Cir-

cuit's approval of the true doubt rule neither dramatically changes the nature of administrative litigation nor undercuts a key principle of the APA. As will be explained, the true doubt rule has been long utilized by the courts of appeals and lower tribunals in both Black Lung and Longshore Act litigation.

Freeman's plea for certiorari is premised on its contention that the APA imposes the burden of persuasion on the black lung claimant. Freeman maintains that this burden of persuasion is contravened by the true doubt's rule's resolution of evidentiary ties in the claimant's favor. Yet, this court's decision in *Transportation Management* refutes any claim that the APA imposes a burden of persuasion on the claimant; *Transportation Management* stated that the APA did not impose a burden of persuasion, but a burden of going forward. *NLRB v. Transportation Management*, 462 U.S. 393, 404 (1983). Because the true doubt rule requires the claimant to make a *prima facie case*, it creates no conflict with the burden of going forward. As the Seventh Circuit correctly observed, the burden of persuasion may be judicially assigned under the APA. *Freeman*, 988 F. 2d at 711, quoting, *Transportation Management*, 462 U.S. at 403, n. 7. The true doubt rule reflects a judicial assignment of the burden of persuasion which is reasonably grounded in the remedial purpose of the BLBA. *Freeman*, 988 F. 2d at 710-711.

While the Third Circuit has accepted the coal companies' attack on the true doubt rule, its weak rationale has not been utilized by Freeman in this petition for rehearing. By rejecting the true doubt rule in both Black Lung and Longshore Act cases the third circuit stands alone in radically altering the evidentiary balance long utilized by the courts, review boards and administrative law judges. Although a historical use of a rule alone does not neces-

sarily justify its existence, it does validate a judicial and administrative consensus that the rule appropriately reflects the parties' relative burdens in light of the remedial purpose of the Black Lung and Longshore Acts. Freeman seeks to dismiss the Black Lung Act's benevolent purpose by arguing that the latest version of presumptions adequately implements Congress's intention. Obviously the tribunals charged with administering the Act disagree, and Congress has taken no action indicating its disapproval of the true doubt rule. Likewise, there is no valid reason for this court to entertain Freeman's invitation to disrupt the settled evidentiary principle embodied by the true doubt rule.

II. The True Doubt Rule Offends Neither the Administrative Procedure Act nor the Black Lung Benefits Act.

Freeman argues that the Seventh Circuit's decision does not square with the preponderance standard established in *Mullins Coal v. Director, OWCP*, 484 U.S. 135 (1987) because it allows the ALJ to resolve equally conflicting x-rays in the miner's favor.[1] However, Freeman totally

[1] Claimant has maintained that there was sufficient evidence in this case to invoke the presumption even without the true doubt rule. The ALJ in this case found it necessary to invoke the true doubt rule because he "disregarded[ed]" the x-ray reading made by Dr. Minetree, a board certified radiologist who was not a B-reader. Freeman Petition, App. D-2. Instead the ALJ, decided to rely on the conflicting opinions of the two B-readers who were also board certified radiologists. *Id.* Claimant contends that it was unreasonable to totally dismiss Dr. Minetree's opinion solely because he was not a B-reader. While B-reader's opinions may be given "more credence" (*Freeman United Coal Mining Co. v. Benefits Review Board*, 879 F. 2d 245, 249 (7th Cir. 1989)) "greater weight" (*Consolidation Coal Company v. Chubb*, 741 F. 2d 968,

(Footnote continued on following page)

avoids *Mullins'* discussion of the true doubt rule. This is obviously a tactical decision, but Freeman's need to have the last word indicates it does not operate from a position of analytical power. Nevertheless, the Seventh Circuit relied upon *Mullins'* reference to the true doubt rule and concluded that *Mullins* had left the "true doubt rule intact." *Freeman v. Director, OWCP*, 988 F. 2d at 711. This conclusion was reasonably based on *Mullins'* quotations from the Secretary's regulatory comments indicating that "The [Black Lung Benefits] Act embodies the principle that doubt is to be resolved in favor of the claimant, and that principle plays an important role in claims determinations both under the interim presumption and otherwise." *Mullins*, 484 U.S. at 156, n. 29, *quoting*, 43 Fed. Reg. 36,826 (1978). The appellate court also noted that *Mullins* specifically addressed the true doubt rule by observing that the BRB "has consistently upheld the principle that, where true doubt exists, that doubt shall be resolved in favor of the claimant." *Mullins Coal*, 484 U.S. at 135, n. 12 (quoting *Lessar v. C.F. & I Steel Corp.*, 3 Ben. Rev. Bd. Serv. (MB) 1-63, 1-68 (Black Lung 1981)). The appellate court concluded that "Far from casting doubt on the true doubt rule, the above language treats the rule as a reasonable interpretation of the regulations." *Freeman*, 988 F. 2d at 712. Further, in sanctioning the secretary's view that a single item of evidence *may* be sufficient to invoke the presumption, the *Mullins* court specifically noted the Secretary's position that doubts

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[1] *continued*

971 (7th Cir. 1984)), or "more weight" (*Johnson v. Island Creek Coal Co.*, 846 F. 2d 364, 366 (6th Cir. 1988)), that does not mean that other qualified opinions are to given no weight. In essence, this is a case where the claimant should have won without invocation of the true doubt rule.

are to be resolved in favor of the claimant. *Mullins Coal*, 484 U.S. at 156, n. 29. Certainly these passages from *Mullins* give no hint that the true doubt rule is in jeopardy, but instead treat it as a well-accepted tool for resolving evidentiary ties. Other courts have also interpreted *Mullins* as supporting the true doubt rule thereby lending support to the Seventh Circuit's conclusions. See, *Woodward v. Director, OWCP*, 991 F. 2d 314, 320 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F. 2d 49, 52 (4th Cir. 1992).

Instead of dealing with *Mullins*, Freeman's prefers to focus on what it claims is the appellate court's misreading of *Steadman* and *Transportation Management*. Yet, Freeman's argument is based upon a narrow and selective construction of those cases. The latter case clearly stated that the "burden of proof" as used in the APA, "means only the burden of going forward, not the burden of persuasion." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 n. 7 (1983). In addition, *Steadman v. SEC*, 450 U.S. 91 (1981) must be read in context. The issue in that case was not whether the APA required the proponent to come forward with probative evidence or bear the burden of persuasion. Rather, the issue was whether the APA dictated a clear and convincing standard of proof. *Steadman* rejected the heightened standard in favor of the preponderance of the evidence; it did not determine what party bears the burden of persuasion. Freeman's suggested interpretation of *Steadman* cannot be reconciled with *Transportation Management's* unequivocal definition of the burden of proof under the APA. The Seventh Circuit's reliance on *Transportation Management* to define the burden of proof under the APA is in harmony with the decisions of other circuits either foreshadowing *Transportation Management* or explicitly relying on the case.

See, *Dazzio v. F.D.I.C.*, 970 F. 2d 71, 77 (5th Cir. 1992); *Merrit v. U.S.*, 960 F. 2d 15, 18 (2d Cir. 1992); *Bosma v. U.S. Dept. of Agriculture*, 754 F. 2d 804, 810 (9th Cir. 1984); see also *Hazardous Waste Treatment Council v. U.S. EPA*, 886 F. 2d 355, 366-67 (D.C. Cir. 1989), cert. denied, 498 U.S. 849 (1990); *State of Maine v. U.S. Dept. of Labor*, 669 F. 2d 827, 829 (1st Cir. 1982); *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F. 2d 25, 39-40 (7th Cir. 1975).

III. The Third Circuit's Position Invalidating the True Doubt Rule Does Not Justify Certiorari in This Case.

The Third Circuit's decision in *Greenwich Collieries v. Director, O.W.C.P.*, 990 F. 2d 730 (3d Cir. 1993), was based on *Mullins'* preponderance standard and the regulatory language found in 20 C.F.R. 718.403. The Third Circuit, however, completely ignored *Mullins'* discussion of the true doubt rule; for that reason its reliance on *Mullins* to invalidate the true doubt rule is flawed. The Third Circuit's decision also depended upon 20 C.F.R. 718.403, a regulation not applicable here. That regulation provides that "the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making the allegation." The court engaged in a semantical splitting of hairs to distinguish the phrase "proving a fact" as different from "burden of proof," the phrase defined in *Transportation Management. Greenwich*, 990 F. 2d at 734-735. The court also relied largely on state court precedent to conclude that proving a fact meant bearing the burden of persuasion on an issue, not coming forward with the evidence. *Greenwich*, 990 F. 2d at 734. Moreover, the Third Circuit's use of section 718.403 to discredit the true doubt rule is faulty because it disregards the deference given to the Secretary's regulatory

interpretations, *Mullins*, 484 U.S. at 159, and ignores the explanation of the intent to be given the part 718 regulations:

> In enacting Title IV of the Act Congress intended that claimants be given the benefit of all *reasonable doubt* as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent. 20 C.F.R. 718.3(c) (emphasis added).

Clearly, the Third Circuit's legal analysis of the issue in *Greenwich Collieries* is lacking.

In its second effort rejecting the true doubt rule the Third Circuit definitively stated that section 7(c) of the APA allocates the burden of persuasion, describing *Transportation Management's* discussion of section 7(c) in a footnote as "dicta." *Maher Terminals v. Dir. Office of Workers Comp.*, 992 F. 2d 1277, 1282 (3d Cir. 1993). Nevertheless, one issue in *Transportation Management* was whether section 7(c) was violated by the NLRB's allocation of the burden of persuasion to the employer. The court's statement that section 7(c) does not determine the burden of persuasion clearly supported its holding that the NLRB properly shifted the burden of persuasion to the employer. The *Maher* decision also erred in attempting to confine *Transportation Management's* holding to affirmative defenses. *Maher*, 992 F. 2d at 1283. No such limitation was expressed by the court; moreover, the authority cited by *Transportation Management* to support its explanation of the burden of proof indicates that its holding is one of general application. *Transportation Management* relied upon a case discussing the legislative history of the APA and the longstanding interpretation found in the Attorney General's Manual on the Administrative Procedure Act.

See, *Environmental Defense Fund, Inc. v. EPA*, 548 F. 2d 998, 1013-1015 (D.C. Cir. 1976) cert. denied, *sub nom, Velsicol Chemical Corp. v. EPA*, 431 U.S. 925 (1977). Obviously the court was aware that the burden of proof imposed by section 7(c) had been broadly interpreted to embrace more than affirmative defenses.

Finally, the *Maher* opinion selectively relied upon certain sentences found in section 7(c) to support its conclusion. It stated that *Transportation Management* dealt only with first sentence of section 7(c); it then concluded that the last sentence of section 7(c) which does not speak to the burden of proof, imposes a burden of persuasion. *Maher*, 992 F. 2d at 1281-1283. It is evident that the Third Circuit's strained rationale supplies no reason to grant certiorari in this case. No other court has given *Transportation Management* such a limited and illogical interpretation.

IV. The Issues Presented Do Not Require This Court's Resolution.

Freeman claims that the Seventh's Circuit's validation of the true doubt rule will "wreak havoc on time-honored civil evidentiary rules." Freeman Petition, p. 21. In fact, it is the abolition of the true doubt rule that will disrupt the established practice of resolving evidentiary ties in favor of the claimant. The Seventh Circuit's approval of the true doubt rule simply provides additional support to a principle which has reflected Congress' intent that "in the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors." S. Rep. No. 743, 92d Cong., 2d Sess. (1972), reprinted in 1972 *U.S. Code Cong. & Ad. News*, 2305, 2315. See, *Collins v. Old Ben Coal Co.*, 861 F. 2d 481, 489-490 (7th Cir. 1989); *Ware v. Director, OWCP*, 814 F. 2d 514, 517 (8th Cir. 1987); see also, *Bosco v. Twin*

Pines Coal Co., 892 F. 2d 1473, 1476 (10th Cir. 1989); *Stomps v. Director, OWCP*, 816 F. 2d 1533, 1534-1535 (11th Cir. 1987); *Orange v. Island Creek Coal Co.*, 786 F. 2d 724, 727 (6th Cir. 1986); *Kowalchick v. Director, OWCP*, 893 F. 2d 615, 621 (3d Cir. 1990).

The use of the true doubt rule in Longshore Act litigation also supports its application in Black Lung cases. The integration of the APA into the Longshore Act does not appear to have been prompted by any desire to override the established rules regarding burdens of proof. Congress incorporated the APA into the Longshore Act so that all hearings would be conducted by qualified examiners, thereby freeing the administrators from having to wear the "dual hat of being hearing officers for purposes of disputes brought under the statute." H.Rep. No. 92-1441, *reprinted in* 1972 U.S. Cong Code & Ad. News, 4698, 4708. Consequently, even after the amendments adopting the APA, the courts in Longshore Act cases adhered to the "settled rule" that "[d]oubts, including the factual, are to be resolved in favor of the employee." *Shahady v. Atlas Tile & Marble Co.*, 682 F. 2d 968, 969-970 (D.C. Cir. 1982) quoting *Wheatly v. Adler*, 407 F. 2d 307, 314 (D.C. Cir. 1968); see also, *Licor v. Washington Metropolitan Area Transit Authority*, 879 F. 2d 901, 903 (D.C. Cir. 1989); *Noble Drilling Co. v. Drake*, 795 F. 2d 478, 481 (5th Cir. 1986); *Parsons Corp. of Cal. v. Director, OWCP*, 619 F. 2d 38, 41 (9th Cir. 1980); *Bath Iron Works Corp. v. White*, 584 F. 2d 569, 574 (1st Cir. 1978). As the Wheatly court observed, rules of proof are tempered by the policy requiring that the Longshore Act be liberally construed. *Wheatly v. Adler*, 407 F. 2d at 313-314; see also *Avondale Shipyards, Inc. v. Kennel*, 914 F. 2d 88, 90-91 (5th Cir. 1990). The courts have not altered the true doubt rule in Longshore Act cases filed after the incorporation of the APA, and neither should the rule's use in Black

Lung cases be affected. This is especially so since the Longshore Act has been amended after the courts persisted in using the true doubt rule with no steps taken to alter its use. P.L. 98-426, reprinted in 1984 U.S. Cong. Code & Admin. News, 98 STAT 1639. Such inaction "indicates approval of court interpretations of the statute made prior to its enactment." *Atkins v. United States*, 556 F. 2d 1028, 1039 (Ct. Cl. 1977), *cert den.*, 434 U.S. 1009 (1977).

The above authorities clearly demonstrate that the Third Circuit's position is an aberration which conflicts with the views universally adopted by the other circuits and lower tribunals. The Third Circuit's break with tradition does not justify an appeal in a case which in no way alters the accepted evidentiary principles. The petition should be denied.

CONCLUSION

For the reasons stated herein, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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